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No. 93-559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE,
in its capacity as the governing board
of the Colorado State University,
Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW,
LAURA BIELAK, SARA STOUT, AMY RECOUPER,
JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD,
HEATHER NAKASONE, KIM JOHNSON,
AIMEE RICE AINSWORTH, and LISA MIZE,
in their individual capacities,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ATLANTIC COAST CONFERENCE, ARIZONA STATE UNIVERSITY, THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, THE COLLEGE FOOTBALL ASSOCIATION, SOUTHERN METHODIST UNIVERSITY, THE UNIVERSITY OF NEBRASKA-LINCOLN, THE UNIVERSITY OF NOTRE DAME, THE WESTERN ATHLETIC CONFERENCE, AND THE NATIONAL WRESTLING COACHES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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November 3, 1993

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief; its letter of consent has been sent to the Clerk. Respondents have refused consent.

The following *amici*—national associations, regional athletic conferences and individual colleges and universities—have a compelling interest in the legal issues presented by this case. These *amici* are fully committed to equal opportunity in university programs and to expansion of women's programs in those areas where women have traditionally been underrepresented. They are gravely concerned, however, with the confusion surrounding Title IX and with the legal issues presented by this case.

1. The American Council on Education ("ACE") is a non-profit national educational association founded in 1918 whose members include more than 1,700 public and private colleges, universities, and educational organizations throughout the United States. As a leading participant in higher educational affairs, ACE's purpose is to promote the interests of all members of the academic community: students, faculty and administration. ACE participates as an *amicus curiae* only on rare occasions when a case, such as this one, presents issues of significant importance to higher education in the United States.

2. Arizona State University ("ASU") is a constitutionally-created body corporate of the State of Arizona governed by the Arizona Board of Regents. The University is a fully accredited bachelor, master and doctoral degree-granting institution located in Tempe, Arizona, with a West Campus in Phoenix, Arizona, and with an enrollment of more than 45,000 students. ASU is an institution dedicated to providing outstanding programs in instruction, research, and service to the state and the nation. ASU considers intercollegiate athletics to be an integral part of the university. It is the policy of ASU to provide equal opportunity through affirmative action in employment and educational programs and activities, including its intercollegiate programs, and discrimination is prohibited on, among other grounds, the basis of sex. ASU urges this Court's grant of *certiorari* and seeks resolution of the existing conflict among the federal circuits.

3. The Atlantic Coast Conference is an intercollegiate athletic organization founded in 1953. The Conference is committed to providing opportunities as required by law for participation in competition, administration and governance in intercollegiate athletics in a spirit of fairness for all. The Conference believes that the liability and remedial issues presented by this case are of vital importance to all schools subject to Title IX.

4. The Board of Governors of the University of North Carolina, known as the University of North Carolina and

located in Chapel Hill, is the governing authority for higher education in the State of North Carolina. The University of North Carolina is composed of sixteen constituent institutions with a total enrollment of approximately 141,884 students. Fifteen of the sixteen constituent institutions field a total of 215 intercollegiate athletic teams. Approximately 4,200 students participate on these teams. In light of these facts, the University of North Carolina has a compelling interest in an authoritative determination of its obligations under Title IX, the standards to be applied in determining whether it has met those obligations, and the remedies which might be enforced against it for alleged violation of those obligations.

5. The College Football Association ("CFA") is comprised of 67 institutions that sponsor intercollegiate football at the most competitive level (Division I-A) within the National Collegiate Athletic Association ("NCAA"). In addition, all CFA members sponsor a variety of other sports for men and women and are subject to Title IX. It is the objective of CFA and its members to demonstrate that sponsorship of quality intercollegiate athletic programs is consistent with the overall objectives of the universities involved. The issues presented in this case are of significant importance to the future of college sports and to all universities that sponsor an intercollegiate athletic program.

6. Southern Methodist University ("SMU") is a private non-profit educational institution located in Dallas, Texas, dedicated to academic excellence through its undergraduate and graduate programs. With more than 5400 undergraduate students, SMU sponsors a number of intercollegiate sports teams for men and women competing at the NCAA Division I-A level. By joining in this *amicus* brief, SMU seeks this Court's enunciation of the standard of compliance with Title IX. SMU also seeks to allow educational institutions, if found to be in violation of Title IX, to determine how to allocate their limited resources consistent with the requirements of Title IX before a court imposes a plan for compliance.

7. The University of Nebraska-Lincoln is a public, tax-supported institution located in Lincoln, Nebraska. With more than 15,000 undergraduate students, the university sponsors a number of men's and women's intercollegiate athletic teams competing at the NCAA Division I-A level. The University of Nebraska-Lincoln joins the other *amici* in seeking review of the important liability and remedial issues raised in the decision below.

8. The University of Notre Dame, ("Notre Dame") is a Catholic University founded in 1842 by the Congregation of Holy Cross. Notre Dame presently enrolls 10,123 students. Striving for excellence both in the classroom and on the playing field, Notre Dame competes at the NCAA Division I-A level, fielding numerous men's and women's intercollegiate teams competing in many different sports. Norte Dame is firmly committed to providing equal opportunity to all of its students and faculty. Without joining all of the specific arguments contained in the *amicus* brief, Notre Dame joins the other *amici* in urging this Court to accept *certiorari* in this case because the questions presented about the application of Title IX principles are of paramount importance to Notre Dame and to every institution seeking to provide equal opportunities to its students.

9. The Western Athletic Conference ("WAC") is an intercollegiate athletic organization made up of the following member institutions: Air Force Academy, Brigham Young University, Colorado State University, Fresno State University, San Diego State University, University of Hawaii, University of New Mexico, University of Texas El-Paso, University of Utah, and University of Wyoming. The WAC has long been committed to equal opportunity for all student athletes, and many of its member universities have taken the lead in fighting against discrimination in all its forms. Because all members of the WAC are subject to Title IX, the liability and remedial issues presented in this case are of crucial importance.

10. The National Wrestling Coaches Association ("NWCA") represents wrestling coaches at all levels and styles in the United States. Amateur wrestling is probably the world's oldest sport. There are presently 366,165 grade school, high school, college and post-college wrestlers throughout the United States. NWCA is particularly concerned about the confusion in the lower courts as to what liability standard governs Title IX claims. It is also gravely concerned that a liability test based on pure statistical disparity will force university administrators to discriminate solely on the basis of gender in establishing university athletic programs.

These *amici* are in a unique position to aid this Court in determining whether *certiorari* should be granted in this case. Each organization and institution has a compelling interest in resolving the confusion which currently exists in the lower federal courts as to the applicable liability and remedial standards which govern Title IX. Until the confusion is resolved, these *amici*—along with all other institutions of higher learning—cannot ascertain with any confidence whether a particular educational offering meets Title IX's mandates.

The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submited,

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November 3, 1993

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BRIEF *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to File which accompanies this brief.

SUMMARY OF THE ARGUMENT

The question of what standard governs Title IX liability is the single most compelling issue surrounding Title IX litigation today. Four different courts of appeals have now weighed in on the issue. Other federal courts have established their own liability standards, leaving no less than six distinct, independent standards.

The uncertainty created by these various tests is disastrous for these *amici* and for all educational institutions charged with Title IX compliance. The liability standard here means everything, because without a defined test educational institutions can never ascertain with any certainty whether offerings in a particular academic area are in compliance with Title IX.

Even if there were no conflict in liability standards, this case would nevertheless merit review because of the unprecedented and extraordinary disparate impact test adopted by the court below. Stripped to its essentials, this test relies upon a pure statistical disparity analysis, requiring that an educational institution meet "statistical proportionality" standards regardless of the interests and abilities of its student body, and regardless of the numerous other factors which may impact upon the creation and maintenance of athletic programs. As such, the standard forces educational institutions to restructure their program offerings solely on the basis of gender, the very evil prohibited by Title IX.

Finally, the remedial scheme adopted by the court below has serious ramifications for all educational institutions. No longer willing to afford institutions of higher learning the discretion to solve discrimination problems,

the remedial scheme takes the unprecedented step of ordering a university to establish and maintain a particular athletic program even though the purported Title IX violation could be solved by other, less intrusive methods.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF NUMEROUS LOWER FEDERAL COURTS AND INTENSIFIES THE WIDE-SPREAD CONFUSION ABOUT WHAT STANDARD SHOULD GOVERN TITLE IX CLAIMS.

After comparing the lower court's holding with the holdings of *Guardians, Cannon,* and *Cohen*,[1] one cannot seriously dispute the existence of a square conflict as to what liability standard should govern Title IX claims. The petition for certiorari contains a complete discussion of the contradictory standards established in these cases, Pet. at 13-20, a discussion which will not be repeated here except to note that the conflict among the circuits and the clash with this Court's own rulings are alone sufficient and strong reasons for granting the petition.

The illumination of the contradictory standards adopted by the First, Seventh, and Tenth Circuits, however, exposes only the tip of the controversy and confusion surrounding Title IX. Without doubt, the single most compelling uncertainty surrounding Title IX litigation today is the question of which standard should be applied to evaluate discrimination claims. This uncertainty is disastrous for these *amici* and for all educational institutions subject to Title IX because they can never ascertain with any confidence whether a particular educational offering is in compliance with the statute's mandate.

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[1] *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981).

A. The exceptional importance of this issue, and a complete understanding of just how far the confusion has spread among the lower courts, is evident only from a full survey of recent federal court rulings which have determined the controlling standard for Title IX liability. In this area, which at least one court of appeals has labeled a "quagmire," *Pfeiffer v. School Bd.*, 917 F.2d 779, 788 (3d Cir. 1990), there are no less than *six* distinct standards—all with separate fundamental elements, all with different rebuttable and irrebuttable presumptions, and all with conflicting burdens of proof.

1. The Tenth Circuit Standard. At the far end of the spectrum lies the standard adopted by the court below. Beginning with the presumption that Title VII is the most appropriate analogue when defining Title IX's substantive standards—a presumption which directly contradicts one of this Court's prior holdings [2]—the court below concluded that an intentional act of discrimination is not a required element under Title IX. Rather, because a plaintiff may make out a Title VII discrimination claim by proving disparate impact, the same type of analysis is sufficient to meet the requirements of Title IX.

But after reaching this conclusion, the court below, without any explanation, did not adopt the shifting-burden standard which governs Title VII claims of disparate impact and disparate treatment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). Instead, it fashioned a unique standard by lifting selected factors and policy interpretations from administrative regulations and by using them to establish a strict three-pronged liability test:

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[2] *See Cannon v. University of Chicago*, 441 U.S. 677, 694-696 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964. . . . The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

> (1) whether there is a statistical disparity between males and females in their athletic participation as compared to their undergraduate enrollment;
>
> (2) whether the institution has expanded and continues to expand opportunities for participation by the underrepresented gender; and
>
> (3) whether the interests and abilities among members of the underrepresented gender are being fully and effectively accommodated.

See Pet. at C-8 - C-9. In other words, a statistical disparity between men and women is conclusive and irrebuttable proof of a Title IX violation unless the educational institution can show "continual expansion" of programs for the underrepresented gender, or unless it "fully and effectively accommodates" the interests and abilities of that gender. *Id.*

To take refuge under the "continual expansion" prong, a university must show that, from the mid-1970s to the present, it has continually and without pause expanded athletic opportunities so as to narrow the statistical disparity. Pet. App. at C-12 - C-13. This is an especially rigorous standard considering the fact that Title IX did not apply to most athletic programs until March 22, 1988, when the Civil Rights Act of 1987 took effect. *See* 20 U.S.C. §§ 1687-1688. Prior to that time, this Court had expressly held that Title IX was program-specific—that is, it did not apply to university and high school athletic programs absent direct federal funding. *Grove City v. Bell,* 465 U.S. 555 (1983). But under the second prong it is insufficient that the university show "continual expansion" of athletic programs for the underrepresented gender since 1988. Rather, the prong will apply only in those rare instances where a university has continually and voluntarily expanded its athletic programs over the past twenty years, even though during the first fifteen years Title IX did not require such expansion.[3]

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[3] The case below is a prime example. From the time Title IX became applicable to athletic programs in 1988, CSU has reduced

Similarly, the third prong of the lower court's standard rarely comes into force. The prong will be satisfied only if there are *no* current members of the underrepresented gender with unaccommodated interests and abilities:

> If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.

Pet. App. at C-15 - C-16 (citation and quotation omitted).

Thus, in practice, the Tenth Circuit standard requires no more than a showing of pure disparate impact. Absent very unusual circumstances—where an educational institution over the past twenty years has "continually expanded" its athletic programs for the underrepresented gender or where the educational institution is currently meeting all of the interests and abilities of that gender—a Title IX violation is established by a mere statistical disparity between the number of male and female athletes in comparison to the number of males and females in the educational community as a whole.

2. *The First Circuit Standard.* Unlike the Tenth Circuit, the First Circuit in *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), concluded that Title VII is not the proper analogue to Title IX; accordingly, it refused to apply any of Title's VII's burdens or standards. *Id.* at 901-902. Further, the court implicitly rejected the holding of the Seventh Circuit that an intentional discriminatory act is a crucial element of any Title IX claim. 991 F.2d at 901-902. It also expressly rejected the pure disparate impact standard, concluding that "a Title IX

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its statistical disparity from 15.6% to 10.5%. Pet. App. C-11 - C-13. At this rate, CSU would almost wipe out any statistical disparity shortly after the turn of the century. But the court below directly held that this progress was insufficient to meet the "continuing expansion" prong, because CSU had made little or no progress during the mid-1980s. The fact that CSU had absolutely no duty under Title IX to expand its female athletic programs during this time seems utterly lost on the court below.

plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with *some further evidence of discrimination . . . .*" *Id.* at 895 (emphasis added). It remains unclear exactly what type of "further evidence" will satisfy this standard, or how much additional evidence is necessary. *See* Pet. at 16, n.20. What is clear, however, is that the First Circuit standard falls somewhere along the spectrum between the Tenth Circuit's pure disparate impact standard and the Seventh Circuit's requirement that plaintiff prove an intentional act of discrimination.

3. The Third Circuit Standard. In two recent cases, the Third Circuit has also provided guidance as to the standards it will apply in adjudicating Title IX claims. *Williams v. School Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993); *Pfeiffer v. School Bd.*, 917 F.2d 779 (3d Cir. 1990). First, unlike the Tenth Circuit, the Third Circuit applies Title VI substantive standards to Title IX claims. *Pfeiffer*, 917 F.2d at 788. Second, and again unlike the Tenth Circuit, the Third Circuit standard focuses neither on a single factor nor on a rigid three-pronged test. Instead, in determining whether a program discriminates on the basis of gender, the Third Circuit engages in a broad evaluation of the "benefits, treatment, services or opportunities afforded male and female athletes in the institution's program as a whole." *Williams*, 998 F.2d at 176 (citation omitted). This presumably includes consideration of all factors identified in the OCR regulations, along with numerous other case-by-case considerations which may be material to the particular program at issue. This broad, far-reaching analysis is best labeled as a balancing approach, which evaluates programs under diverse factors that may differ greatly from institution to institution and that may carry substantially different weight depending upon the factual context in which they arise.

4. The Title VII/McDonnell-Douglas Standard. Still other federal courts in Title IX cases have simply adopted the identical substantive standards established by this

Court for Title VII cases. *See Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *order vacated as moot*, 992 F.2d 17 (2d Cir. 1993); *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989). Like the Tenth Circuit, but in direct contradiction to the First and Third Circuits, these courts hold that Title VII is the model from which to take substantive liability standards. 802 F. Supp. at 743; 709 F. Supp. at 361-362. Moreover, because Title VII allows pure disparate impact claims, so too does Title IX. *Id.* Unlike the Tenth Circuit's standard, however, this approach actually incorporates the shifting burden analysis of *McDonnell-Douglas* to evaluate disparate impact claims. Thus, a plaintiff must first prove a disproportionate impact or effect. If this showing is made, the burden shifts to the defendant to prove an "educational necessity" or other justification for the disparate impact. If the defendant meets this requirement, the burden shifts back to the plaintiff to show that the defendant's justifications are pretextual. *Id.*

When compared to the standard adopted by the Tenth Circuit, the conflict between the approaches is obvious. While under the Title VII standard an educational institution may point to any justification or well-grounded reason to explain the statistical disparity, under the Tenth Circuit standard the institution's response is limited solely to showing that it has "continually expanded" its programs to diminish the disparity, or that it has "fully and effectively accommodated" the interests of the underrepresented gender. Pet. App. at C-9. Stated another way, while the *McDonnell-Douglas* standard throws open the door so as to consider every possible reason for the statistical disparity, the Tenth Circuit approach forcefully holds the door closed to only a crack. No matter how great the justification, and no matter how well-grounded the institution's arguments as to the nondiscriminatory cause of the statistical disparity, they are immaterial unless they can "squeeze" through the Tenth Circuit's strict definitions of continual expansion or full and effective accommodation.

5. The Statute Regulations Standard. Still other lower federal courts hold that the appropriate substantive standard depends upon whether the plaintiff is seeking relief under the statute or under the regulations. Based upon a reading of the various individual opinions in *Guardians*, these courts hold that while discriminatory intent is necessary to establish a violation of Title IX, such intent is apparently unnecessary to establish a violation of the OCR regulations implementing Title IX. *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185 (S.D.N.Y. 1988), *aff'd*, 882 F.2d 621 (2d Cir. 1989); *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987), *modified*, 1988 WL 3845 (E.D. Pa. January 19, 1988). These courts offer no explanation as to how an implementing regulation, which draws its authority solely from the underlying statute, can disregard the intentional discrimination standard required under that statute.[4]

6. The Seventh Circuit Standard. At the near end of the spectrum lies the standard adopted by the Seventh Circuit in *Cannon*. This standard expressly requires that plaintiff prove an *intentional discriminatory act* as part of her prima facie case under Title IX. 648 F.2d at 1109-1110. As with so many of the standards spread along the spectrum, this one is in direct conflict with many of the competing approaches. Thus, in specific contradiction to the Tenth Circuit and Title VII standards, the Seventh Circuit approach expressly recognizes that Title VI standards provide the best "guidance regarding the proper interpretation of Title IX." 648 F.2d at 1106. Moreover, *Cannon* specifically raises, considers, and rejects the

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[4] *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring in the judgment) ("If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply 'further' the purpose of Title VI, they go well *beyond* that purpose.") (emphasis in original).

statute/regulation approach, expressly holding that "the regulation can not impose a standard broader than that imposed by [Title IX]." *Id.* at 1109 n.4. Finally, and perhaps most importantly, the Seventh Circuit standard clashes with all of the other approaches in that it requires the plaintiff to prove an actual intent to discriminate on the part of the educational institution. The mere fact that an institution's policies may have created a disparate impact is insufficient. *Id.* at 1109. So too it is insufficient for plaintiff to prove that the educational institution knew of this disparate impact but failed to take appropriate remedial steps. *Id.* at 1110. Rather, absent evidence that an educational institution acted *intentionally* to discriminate on the basis of gender, a Title IX claim fails as a matter of law. *Id.* at 1109-1110.

B. The substantive standard to be applied to Title IX means everything. An educational institution's approach to the programs it offers to males and females will differ dramatically depending on whether liability arises under a pure disparate impact standard, under a balancing standard, under a shifting burdens standard, under a statute/regulation standard, under an "intentional act" standard, or under some other standard, as yet undefined. Educational institutions will be able to measure their conduct and ensure their compliance with Title IX only after they are clear on the specific test that courts will use to determine discriminatory conduct.

The standards presently used by the courts of appeals and district courts range across a broad spectrum. These lower federal courts are not only currently split on the question of Title IX liability,[5] they are shattered beyond any hope of reconciliation. The appropriate and governing test remains not only elusive, it remains unfathomable

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[5] *See, e.g., Yusuf v. Vassar College*, 827 F. Supp. 952, 956 (S.D.N.Y. 1993) ("Interestingly, neither the Supreme Court nor the Court of Appeals for the Second Circuit has determined specifically whether intent must be shown in Title IX cases. In fact, courts examining the issue are divided.") (citations omitted).

in a "quagmire" of contradictory opinions and holdings. *Pfeiffer v. School Bd.*, 917 F.2d 779, 788 (3d Cir. 1990). The confusion cannot be allowed to persist. This case presents an excellent vehicle for this Court to resolve the confusion and to illuminate the appropriate standard which governs Title IX liability.

II. THE DISPARATE IMPACT STANDARD ADOPTED BY THE LOWER COURT PLACES AN OVERWHELMING AND INAPPROPRIATE BURDEN ON EVERY EDUCATIONAL INSTITUTION SUBJECT TO TITLE IX.

A. The Standard Adopted by the Lower Court Presents Far-Reaching Issues of Exceptional Importance Extending Not Only to Athletics, But to All Programs Offered by Educational Institutions.

At the outset, it is crucial to keep in mind Title IX's broad application. Without question, the statute's anti-discrimination provisions apply to every intercollegiate or high school athletic program sponsored by an institution which receives any type of federal funding. 20 U.S.C. § 1687. This area alone has spawned numerous and extended litigation battles on many diverse issues.

But Title IX is in no way limited to athletic programs. Indeed, the legislative history scarcely even mentions intercollegiate or interschool athletics, *see* 118 Cong. Rec. 5,807 (1972); 117 Cong. Rec. 30,407 (1971), focusing instead on the wide variety of programs and course offerings throughout secondary and post-secondary education. This focus has not been lost on Title IX litigants, nor on the educational institutions which must comply with Title IX. Over the past decade, numerous assorted and diverse actions have alleged gender discrimination in a wide variety of areas such as medical school admissions, employment in a university's physical education department, use of endowments in a university English department, membership in the National Honor Society, chairmanship of a high-school science department, conversion of an all-girl school to a coeducational institution, and award of

merit scholarships to males and females based on SAT scores.[6]

The point here is that the lower court's disparate impact standard may very well extend beyond alleged discriminatory exclusion in university athletics to all programs offered by an institution, athletic or non-athletic. After all, if the Tenth Circuit's disparate impact analysis truly is the standard for determining gender discrimination in an institution's operations, it seemingly makes little difference whether the area of focus is on athletic programs, on theatre and dance programs, on academic programs, on student-aid programs, on clubs recognized or financed by the educational institution, on various colleges or departments within the institution itself, or on some other part of the educational institution's curriculum. Indeed, a different test for some or all of these areas would substantially contradict the single dictate of the statute which prohibits discrimination in "*any* education program or activity." 20 U.S.C. § 1681(a) (emphasis added). A test with such broad and crucial ramifications deserves the review and consideration of this Court. *Cf. Hazelwood Sch. Dist. v. United States,* 433 U.S. 299 (1977) (*certiorari* granted "to consider a substantial question affecting the enforcement of a pervasive federal law").

B. The Lower Court's Disparate Impact Standard Creates Devastating and Unintended Consequences For All Educational Institutions Subject to Title IX.

Engaging in a detailed analysis of this Court's prior opinions and of Congress's express intent memorialized within the statute itself, the petition thoroughly and per-

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[6] *See Cannon v. University of Chicago,* 648 F.2d 1104 (7th Cir.), *cert. denied,* 454 U.S. 1128 (1981); *Marby v. State Bd. of Comm. Coll & Occ. Educ.,* 813 F.2d 311 (10th Cir. 1987); *Chance v. Rice Univ.,* 984 F.2d 151 (5th Cir. 1993); *Pfeiffer v. School Bd.,* 917 F.2d 779 (3d Cir. 1990); *Nagel v. Avon Bd. of Educ.,* 575 F. Supp. 105 (D. Conn. 1983); *Jones v. Board of Educ.,* 632 F. Supp. 1319 (E.D.N.Y. 1986); *Sharif v. New York State Educ. Dep't,* 709 F. Supp. 345 (S.D.N.Y. 1989).

suasively shows that the lower court's disparate impact standard is in direct conflict with previously recognized standards governing Title IX. Pet. at 17-20. Even if the petition were incorrect, however, the lower court's pure disparate impact standard would merit this Court's review because of the extraordinary and catastrophic effects such a standard will have upon programs offered at educational institutions.

1. The court below determined that initial liability requirements under Title IX are satisfied by a showing of a statistical disparity between the number of males and females who participate in athletic programs and the number of males and females who comprise the educational campus as a whole. Pet. App. at C-10 - C-12. Unfortunately, the court of appeals provided little guidance on what constitutes "substantial disparity" except to conclude that a 10.5% disparity violates the standard. *Id.* at C-12. The district court provided somewhat better direction, openly stating that a 1.7% gap would be "acceptable." *Id.* at A-19.

On two different fronts, this statistical standard decimates all types of programs offered by educational institutions while failing to provide any real assurance of equal opportunity. First, the statistical analysis used under the lower court's standard flounders in attempting to measure discriminatory treatment, the single evil which Title IX seeks to remedy. This is because—totally without support, citation, or explanation—the decision below embraces the assumption that, at all educational campuses across the nation, men and women have the same interests and qualifications to participate in competition. This assumption not only skews the entire analysis as to whether university programs provide equal accommodation to males and females according to their interests, it also directly violates this Court's instructions governing the use of statistical analyses to establish discriminatory exclusion.

It is true that, in a number of different contexts, this Court has previously determined that statistical analyses

may "serve an important role as *one indirect indicator*" of institutional discrimination. *Mayor v. Educational Equality League*, 415 U.S. 605, 620 (1974) (emphasis added). But this Court has also strongly cautioned lower courts against comparisons to the general population when special interests or qualifications are required. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977). Thus, while statistical comparisons to a general population may be probative for unskilled or entry level positions,

> where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).

Given today's status of intercollegiate athletics (and even high school varsity sports), no one can seriously contend that the skill and interest necessary to compete are possessed equally by all students in the educational community. If statistical disparity analysis is to be used at all then, it must look to the qualifications and interests of males and females in the university community. More specifically, the analysis must measure any disparity between male and female athletic opportunities, not *in comparison to the number of males and females in the entire educational community*, but rather *in comparison to the number of males and females who possess the special qualifications and interests necessary to compete at the intercollegiate or varsity level.* The standard for statistical analysis established by the court below strays far afield from these recognized principles. As in *Mayor*, "the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning" in determining whether discriminatory exclusion has occurred here. 415 U.S. at 620.

Second, even if the unsupported statistical analysis established by the court below were somehow acceptable, the lower court's pure disparate impact standard cannot survive because it fails to give educational institutions the

opportunity to rebut or explain the statistical disparity. Significantly, with only a handful of possible exceptions, no university competing athletically at the Division I level can satisfy the proportionality requirement as it is set forth under the lower court's standard. *See* Pet. at 8 n.11. Far above Colorado State's disparity percentage of 10.5%, the NCAA average for all reporting Division I schools approaches 20%. *NCAA Gender-Equity Study, Summary of Results*, March 1992 at 4. While this disparity can be explained through several different legitimate justifications, these justifications do a university absolutely no good under the lower court's standard.[7]

Had the lower court followed through on its conclusion that Title VII supplies the substantive standards for deter-

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[7] At many universities, the disparity will stem directly from the different level of interest and ability between the male and female student population. Even at those universities where interest and ability are approximately equal, however, the differences in male-dominated and female-dominated sports go a long way in explaining the disparity. Of the 19 sports tracked by the NCAA, Division I universities provide more female teams than male teams in seven sports (cross country, field hockey, gymnastics, swimming, tennis and volleyball), provide a substantially equal number of male and female teams in four sports (basketball, fencing, skiing, and track), and provide more male teams than female teams in eight sports (baseball, football, golf, ice hockey, lacrosse, rifle, soccer, water polo and wrestling). *NCAA Gender-Equity Study, Summary of Results*, March 1992 at 4.

The great disequalizer comes in the form of men's football. With no women's football teams, with male teams averaging over 100 players per program, and with no other sport able to accommodate even close to this number of participants, the statistical disparity arises practically from football alone. Indeed, if football were eliminated, the disparity would immediately become negligible, somewhere near 5%. *Id.*

To be sure, whether these and other factors are justification for the current disparity remains in question, and may be determinable only on a case-by-case basis. The crucial point, however, is that the standard adopted by the court below does not even allow the university to present these possible justifications. Instead, after a statistical disparity has been shown by the plaintiff, the university's only recourse is to satisfy the continual expansion or full and effective accommodation prongs. Pet. App. at C-9.

mining a violation under Title IX, it would have at least provided the university with a method whereby it could present its educational or other justifications for a substantial statistical disparity. Such an opportunity is not available under the lower court's standard measuring liability under Title IX. Once a substantial disparity is proven by plaintiff, that "safe harbor" is closed, and the "institution must show that it has expanded and is continuing to expand the opportunities for athletic participation by the underrepresented gender, or else it must fully and effectively accommodate the interests and ability among members of the underrepresented gender." Pet. App. at C-9.

Taken together, these two considerations create almost insurmountable obstacles for compliance with Title IX. With few exceptions, no Division I university will pass a statistical disparity test which focuses solely on the percentage of males and females attending the university, regardless whether these individuals have the interests or qualifications to participate in competitive sports. Nor, faced with a disparity that it cannot avoid, can a university bring forth justifications for the differing percentages, no matter how valid those reasons might be. Given these rules, the result is determined before the analysis ever begins.

2. Stripped to its essentials, the lower court's disparate impact standard provides great cause for concern. Initially, the standard gives the educational institution absolutely no discretion to eliminate larger men's programs and smaller women's programs so as to narrow the statistical disparity. Pet. App. at C-15 - C-16. Indeed, that is exactly what Colorado State attempted to do in the case below. Practically speaking, this power is crucial to universities if they are to deal with existing budget difficulties and at the same time reduce the purported statistical disparity. Immense operational costs (like those required to maintain an indoor tennis facility, an indoor track facility, a special lacrosse field or a gymnastics training center) remain unchanged if only the male program can be eliminated, because the female program will still

require that the large operational costs be incurred. Thus, while instructing educational institutions to do everything possible to diminish a purported statistical disparity, the lower court's standard takes away one of the most effective tools for doing so.

The corollary principle is that, while a purported statistical disparity exists, no current women's athletic program may be cut over the objection of team members, no matter how costly or impractical the program has become. This knowledge creates an enormous disincentive to establish additional women's programs at universities. Even if only experimental or temporary, university athletic administrators will know that once a women's program is there, it is there to stay.

Most importantly, the institution's ability to choose the best method for allocating athletic resources on a fair and nondiscriminatory basis is severely curtailed. Indeed, as the court below expressly recognized, except in those very few instances where budgetary considerations will allow a university to massively increase the number of its women's athletic programs, the only true option available to educational institutions is to eliminate the disparity by cutting men's athletic slots and by replacing them with female athletic slots. *See* Pet. App. at C-21 - C-22. Although never before raised in a Title IX suit, given this Court's pronouncements in other contexts regarding the permissible scope of antidiscrimination plans, cutting male athletic positions and replacing them with female positions solely to achieve gender balance raises grave constitutional and civil rights concerns. *See Steelworkers v. Weber,* 443 U.S. 193, 208 (1979); *Johnson v. Transportation Agency,* 480 U.S. 616, 638 (1987).

This gender-focused analysis is the paramount concern, and the reason which alone merits this Court's grant of *certiorari.* The extraordinary standard adopted by the court below requires educational institutions to restructure their athletic programs—intentionally eliminating men's programs solely because their participants are male and

intentionally creating women's programs solely because their participants are female—all in the name of "gender proportionality". The level of athletic interest between males and females is irrelevant. The various justifications for a statistical imbalance are immaterial. The broad and diverse interests within a particular university have no place in the analysis. Instead, the establishment, maintenance, funding and elimination of particular university programs are driven *by gender alone.*

Whatever the ultimate merits of the lower court's standard, it surely represents a major departure from previous precedent, requiring actions of educational institutions which have never been required before. Before such radical—and perhaps irreversible—changes occur, this Court should determine whether the lower court's standard is consistent with the purposes and dictates of Title IX.

III. THE REMEDIAL SCHEME APPROVED BY THE COURT BELOW HAS A PROFOUND EFFECT UPON THE ADMINISTRATION OF ALL EDUCATIONAL INSTITUTIONS SUBJECT TO TITLE IX.

As fully described in the petition, Pet. at 21-23, the remedial rules established by the court below directly contradict the rules applied in the First Circuit, creating a conflict which alone is worthy of this Court's review. But perhaps even more important than this conflict, the Tenth Circuit's scheme violates firmly held constraints which directly govern a federal court's remedial power. In constitutional and statutory cases alike, this Court and others have long required that a remedy be narrowly tailored to correct a defendant's violation.[8] This principle takes on special concern when state or local educational institutions are involved. As this Court has expressly recognized on more than one occasion:

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[8] *See e.g., Milliken v. Bradley*, 433 U.S. 267 (1977); *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

> [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs . . . . [S]chool authorities have the *primary* responsibility for elucidating, assessing, and solving [discrimination] problems . . . ."

Milliken, 433 U.S. at 280-281 (emphasis in original) (quotation and citation omitted). Thus, after finding a violation a district court should initially order the offending educational entity to formulate a plan which will bring it into compliance. The court may then review and hear objections to this plan to determine whether it adequately remedies the violation previously found. *Missouri v. Jenkins*, 495 U.S. 33, 52 (1990) ("By no means should a district court grant local government *carte blanche*, but local officials should at least have the opportunity to devise their own solutions to these problems.") (citation omitted).

The court below took exactly the opposite stand. Determining that the harms plaintiffs had sustained and the relief they had requested were softball specific, the court expressly rejected the university's argument that it should be allowed to formulate a plan to bring itself into compliance with Title IX. Pet. App. at C-19 - C-22. Instead, the court simply ordered the reinstatement of women's softball at Colorado State. The approach severely misapplies Title IX and strikes a motal blow to its fundamental objectives. Title IX conveys to plaintiffs the right to be free from gender discrimination in a university's creation and administration of its athletic programs. It *does not* convey to plaintiffs the right to participate in intercollegiate softball or any other specific sport. Assuming that a statistical disparity alone constitutes a violation of Title IX, the method by which compliance is to be achieved—by hiring or firing staff, by establishing or eliminating university programs, by expanding or contracting the slots available in those programs, by spending more or less money in a given area—is a decision which belongs to the university. It is one thing to order a university to

weigh the various choices and to bring itself into compliance with Title IX; it is quite another to order a university, program-by-program and expenditure-by-expenditure, to follow one of the several courses of action available to it. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (a university has a special right "to make academic judgments as to how best to allocate scarce resources") (citation and quotation omitted).

The practical consequence of the lower court's remedial scheme is to eliminate a university's discretion in these areas, and to place total control of university programs and resources in the hands of the court. Thus, as occurred in the case below, a few members of the underrepresented gender with a particular interest will be able to force a university to implement or retain a specific program without any broader examination as to whether other members of the underrepresented gender might benefit more from some other program, and without any consideration as to whether it may be better to reduce men's programs, add different women's programs, or take some other action to bring the university into compliance.

Moreover, once a program is established at the university in compliance with the lower court's remedial order, the sport will remain in perpetuity regardless of its practicality, cost, or overall benefit to the university community. It is true, as the lower court recognized, that the current softball plaintiffs will someday graduate or transfer from the university. Pet. App. at C-21. But those team members will be replaced by other, younger team members, whom under the lower court's order the university is forced to recruit to ensure "team development." *Id.* C-22. The process thus becomes a vicious circle, with current team members forcing the university to maintain a softball program and recruit new players for the future, and with those future players becoming the plaintiffs of tomorrow to ensure that their current interests and abilities—interests and abilities which the university is forced to nurture and magnify under the lower court's remedial

scheme—do not go unaccommodated. There is absolutely no evidence that Congress intended such a result under Title IX.[9]

Whatever the merits of the Tenth Circuit's approach, there can be little dispute that it is extraordinary, and that it greatly reduces the previous discretion given to educational institutions in complying with antidiscrimination provisions. Its potential impact is devastating and irreversible to more than 1250 institutions of higher education across the country, not to mention the thousands of secondary schools and other institutions subject to Title IX's provisions. Before such a remedial scheme becomes entrenched, this Court should grant review to determine if it is consistent with the dictates and purposes of Title IX.

CONCLUSION

This Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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[9] Moreover, coupled with the "continual expansion" prong, the remedial scheme actually moves full compliance. Believing that it had responsibility to increase women's athletics in the 1970s, Colorado State made an extraordinary effort and successfully added eleven new sports for women. Having expended substantial resources in this endeavor, no new sports were added in the early and middle 1980s. The late 1980s and early 1990s brought renewed efforts from the university, with new resources and reallocation again substantially diminishing the disparity. Colorado State's mistake—now that it has the benefit of the lower court's remedial scheme and its "continual expansion" prong—is that it should not have created all eleven women's programs at essentially the same time. Rather, it should have bided its time, adding a new women's program every one or two years, so that over the two decades it could plainly show that it had "continually expanded" its athletic opportunities for women. Of course, the young women who attended Colorado State University during the late 1970s and early 1980s would not have had as many diverse athletic programs available to them, but that consideration apparently counts for very little under the lower court's overall remedial scheme.

Respectfully submitted,

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